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UNITED STATES DISTRICT COURT  
 SOUTHERN DISTRICT OF CALIFORNIA

JAMES M. KINDER,	)	Case No. 3:07-cv-02132-H-CAB
	)	
Plaintiff,	)	<b>MEMORANDUM OF POINTS</b>
	)	<b>AND AUTHORITIES IN</b>
-against-	)	<b>SUPPORT OF MOTION FOR</b>
	)	<b>PARTIAL JUDGMENT ON</b>
NATIONWIDE RECOVERY SYSTEMS, LTD.,	)	<b>THE PLEADINGS</b>
	)	
Defendant.	)	Date: January 22, 2008
	)	Time: 10:30 a.m.
	)	Place: Courtroom 13

**I. INTRODUCTION**

Defendant, Nationwide Recovery Systems, Ltd. ("NRS"), submits this memorandum in support of its Motion for Partial Judgment on the Pleadings.

*For over 10 years*, plaintiff, James M. Kinder, has made a business of being a professional plaintiff by improperly filing lawsuits under the Telephone Consumer Protection

1 Act of 1991 (“TCPA”), 47 U.S.C. § 227. These TCPA lawsuits relate to telephone calls made  
2 to number 619-999-9999 (the “9s Number”), which is allegedly the telephone number  
3 assigned to plaintiff’s paging service. Every court which has ruled on plaintiff’s TCPA  
4 claims has dismissed the claims, including this Court in *James M. Kinder v. Associates*  
5 *Housing Finance, LLC, et al.*, Case No. 99-02411 (S.D. Cal. 1999) (Jones, J.). Despite these  
6 rulings, plaintiff continues to file (and in some cases re-file) baseless TCPA lawsuits. As  
7 noted below, currently, there are 8 *Kinder* lawsuits pending in this Court and approximately  
8 100 lawsuits pending in state court.

10 Plaintiff alleges, *inter alia*, that NRS violated the TCPA and 47 C.F.R. § 64.1200  
11 because the “prerecorded message calls” NRS made to his 9s Number failed to identify  
12 NRS’s business name and telephone number. Plaintiff seeks \$500, or \$1,500, for each  
13 “prerecorded message call” that allegedly failed to contain NRS’s business name and  
14 telephone number.

16 Even if the Court assumes that all of NRS’s “prerecorded message calls” failed to  
17 identify NRS’s business name and telephone number, pursuant to Fed. R. Civ. P. 12(c),  
18 plaintiff’s claim should be dismissed for failure to state a cause of action. As numerous courts  
19 have ruled, there is no private right of action for violations of 47 U.S.C. § 227(d), or 47  
20 C.F.R. § 64.1200 (the related regulation). *See, e.g., Boydston v. Asset Acceptance LLC*, 496  
21 F.Supp.2d 1101, 1110 (N.D. Cal. 2007). Only the state attorney generals have the authority to  
22 bring an action on behalf of their citizens for violation of this TCPA section and related  
23 regulation. *Id.*

25 ///

## II. PROCEDURAL HISTORY AND FACTS

Plaintiff alleges that NRS violated the TCPA by calling and leaving messages on his 9s Number. *See* Docket No. 1, Complaint. As noted by this Court in *James M. Kinder v. Associates Housing Finance, LLC, et al.*, Case No. 99-02411 (S.D. Cal. 1999), “many companies use the number 999-9999 as a default number in their computer records for new customers without a phone number or for existing customers whose recorded number has become defunct.” Exhibit A, *Kinder* Decision, at p. 2, lns. 13-15. Currently, there are at least 8 known *Kinder* lawsuits pending in this Court, including:

1. *James M. Kinder v. Bankfirst*, Case No. 07-00877-DMS-POR;
2. *James M. Kinder v. Sprint PCS Assets LLC*, Case No. 07-02049-WQH-JMA;
3. *James M. Kinder v. Asset Acceptance, LLC*, Case No. 07-02084-L-LSP;
4. *James M. Kinder v. Astra Business Services, Inc.*, Case No. 07-02091-H-JMA;
5. *James M. Kinder v. Nationwide Recovery Systems, LTD*, Case No. 07-02132-H-CAB [this case];
6. *James M. Kinder v. Discover Card Services, Inc.*, Case No. 07-02138-WQH-BLM;
7. *James M. Kinder v. Enhanced Recovery Corporation*, Case No. 07-02152-IEG-POR; and,
8. *James M. Kinder v. Harrah’s Entertainment, Inc.*, Case No. 07-02226-H-RBB.

Exhibit B, *Kinder* Docket Reports. The lowest numbered case is *James M. Kinder v. Bankfirst*, Case No. 07-00877-DMS-POR, pending before Judge Dana M. Sabraw. *Id.* Pursuant to Fed. R. Civ. P. 42, NRS will seek to consolidate all of the *Kinder* lawsuits and have them heard before J. Sabraw. Upon information and belief, there are approximately 100 *Kinder* lawsuits pending in state court.

Specifically, plaintiff alleges that NRS violated the TCPA in 2 ways. *See* Docket No.

1, Complaint. First, plaintiff alleges NRS violated the TCPA by calling his “number assigned to a paging service, using an automatic telephone dialing system and/or an artificial or prerecorded voice[.]” *Id.* at ¶ 8. Second, plaintiff alleges NRS violated the TCPA and 47 C.F.R. § 64.1200 by failing to include in its “prerecorded telephone messages” NRS’s business name and telephone number. *Id.* at ¶¶ 9-12. NRS’s motion for partial judgment on the pleadings relates to only this latter claim.

On November 14, 2007, NRS filed an answer, generally denying liability. *See* Docket No. 2.

### **III. LAW AND ARGUMENT SUMMARY**

Rule 12(c) provides that, “[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings.” “A motion for judgment on the pleadings per Fed. R. Civ. P. 12(c), like a motion to dismiss for failure to state a claim, addresses the sufficiency of a pleading.” *Plumbers & Pipefitters Local 572 Pension Fund v. Cisco Systems, Inc.*, 411 F.Supp.2d 1172, 1174 (N.D. Cal. 2005). “Judgment on the pleadings is proper when the moving party clearly establishes on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law.” *Hal Roach Studios, Inc. v. Richard Feiner and Co., Inc.*, 896 F.2d 1542, 1550 (9th Cir. 1990).

#### **A. There Is No Private Right Of Action For Violations Of 47 U.S.C. § 227(d), Or 47 C.F.R. § 64.1200**

“Congress enacted the [TCPA in 1991] in response to various telemarketing practices[.]” *Satterfield v. Simon & Schuster*, 2007 WL 1839807, \*3 (N.D. Cal. 2007). “[T]he TCPA seeks to deal with an increasingly common nuisance—telemarketing.” *ErieNet*,

1 *Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 514 (3d Cir. 1998); *see also F.T.C. v. Mainstream*  
 2 *Marketing Services, Inc.*, 345 F.3d 850, 857 (10th Cir. 2003) (“In the TCPA, Congress found  
 3 that unrestricted telemarketing can be an intrusive invasion of privacy and that many  
 4 consumers are outraged by the proliferation of intrusive calls to their homes from  
 5 telemarketers.”) (*citing* Pub. L. No. 102-243, at § 2).

6  
 7 The Federal Communications Commission (“FCC”) is “the agency Congress gave  
 8 authority to prescribe regulations to implement the TCPA.” *Satterfield*, 2007 WL 1839807 at  
 9 \*4; *see also* 47 U.S.C. § 227(b)(2).

10 “[S]ection 227(d) and its regulations provide technical and procedural standards with  
 11 which all ‘systems used to transmit any artificial or prerecorded voice message’ must  
 12 comply.” *Boydston*, 496 F.Supp.2d at 1110. In relevant part, § 227(d) states:

13  
 14 The [FCC] shall prescribe technical and procedural standards for systems that  
 15 are used to transmit any artificial or prerecorded voice message via telephone.  
 16 Such standards shall require that . . . all artificial or prerecorded telephone  
 17 messages (i) shall, at the beginning of the message, state clearly the identity of  
 the business, individual, or other entity initiating the call, and (ii) shall, during  
 or after the message, state clearly the telephone number or address of such  
 business, other entity, or individual[.]

18 47 U.S.C. § 227(d)(3). Pursuant to § 227(d), the FCC enacted the following regulation:

19 All artificial or prerecorded telephone messages shall:

- 20 (1) At the beginning of the message, state clearly the identity of the business,  
 21 individual, or other entity that is responsible for initiating the call. If a  
 22 business is responsible for initiating the call, the name under which the entity  
 23 is registered to conduct business with the State Corporation Commission (or  
 comparable regulatory authority) must be stated, and  
 24 (2) During or after the message, state clearly the telephone number (other than  
 25 that of the autodialer or prerecorded message player that placed the call) of  
 such business, other entity, or individual. The telephone number provided may  
 26 not be a 900 number or any other number for which charges exceed local or  
 long distance transmission charges. . . .

1 47 C.F.R. § 64.1200(b).

2 Most importantly, there is no private right of action for violations of the procedural  
3 and technical standards set forth in the above block quoted TCPA section and regulation. As  
4 the Northern District of California has ruled:

5  
6 In contrast to section 227(b)(3), the remedy for violations of the procedural and  
7 technical standards confers no private right of action. Instead, the TCPA  
8 allows States to bring suit to remedy “a pattern or practice” of violations of the  
9 TCPA. Section 227(f)(1) provides that “[w]henver the attorney general of a  
10 State . . . has reason to believe that any person has engaged . . . in a pattern or  
11 practice of telephone calls . . . in violation of this section or the regulations  
12 prescribed under this section, the State may bring a civil action on behalf of its  
13 residents . . . .” Section 227(f)(2) grants the district courts of the United States  
14 exclusive jurisdiction over such State initiated actions.

15 *Boydston*, 496 F.Supp.2d at 1106 (citations omitted). Numerous other courts have agreed  
16 with the Northern District’s ruling that there is no private right of action for violations of §  
17 227(d), or the related regulation. *See, e.g., Kopff v. Battaglia*, 425 F.Supp.2d 76, 90-91 (D.  
18 D.C. 2006) (“Plaintiffs assert an entitlement to damages under the TCPA due to defendants’  
19 alleged failure to comply with [FCC] regulations that require faxes to identify properly the  
20 individual or entity sending the message and to provide the phone number of the sender. The  
21 TCPA, however, does not create a private right of action for every violation of its provisions,  
22 but instead creates such a right only in specific circumstances. . . . The fax identification  
23 regulations upon which plaintiffs rely, 47 C.F.R. § 68.318, were issued pursuant to subsection  
24 (d) of section 227, and thus there is no private right of action under the TCPA for violation of  
25 those regulations. Hence, plaintiffs have failed to state a claim upon which relief may be  
26 granted under the TCPA to the extent that they rely on asserted violations of the fax  
27 identification regulations.”) (citations omitted); *Klein v. Vision Lab Telecommunications, Inc.*,

1 399 F.Supp.2d 528, 539 (S.D. N.Y. 2005) (“[N]o independent cause of action exists for  
2 violations of § 227(d) [or the regulations enacted thereunder.]”); *Adler v. Vision Lab*  
3 *Telecommunications, Inc.*, 393 F.Supp.2d 35, 38-39 (D. D.C. 2005) (“Defendants contend the  
4 TCPA does not provide a private right of action for such a claim. Based on the plain language  
5 of the statute, the Court agrees. The private right of action established by § 227(b)(3) limits  
6 the right to “an action based on a violation of *this subsection* [i.e., subsection (b)] or the  
7 regulations prescribed under *this subsection*.” 47 U.S.C. § 227(b)(3) (emphasis added). The  
8 regulations cited by plaintiffs, however, were issued pursuant to a directive in § 227(d).  
9 Section 227(b) addresses unsolicited faxes, not improperly identified faxes. A private right of  
10 action exists only with respect to unsolicited faxes. *See* 47 U.S.C. § 227(d) (omitting any  
11 mention of a private right of action.”) (citations omitted); *USA Tax Law Center, Inc. v. Office*  
12 *Warehouse Wholesale, LLC*, 160 P.3d 428, 434 (Colo. App. 2007); *Lary v. Flasch Business*  
13 *Consulting*, 878 So.2d 1158, 1165 (Ala. Civ. App. 2003) (“However, in contrast to violations  
14 of subsection (b) of 47 U.S.C. § 227, which are subject to private rights of action under 47  
15 U.S.C. § 227(b)(3), Congress did not authorize private citizens to bring actions to impose  
16 penalties for or recover damages allegedly flowing from violations of subsection (d) of that  
17 statute.”). All of the authorities agree that only the states may bring an action on behalf of  
18 their citizens for violations of this TCPA section and related regulation. *Id.*

21  
22 Contrary to plaintiff’s allegations, there is no private right of action for violations of §  
23 227(d), or 47 C.F.R. § 64.1200. In light of this settled law, as a matter of law, NRS is entitled  
24 to judgment on plaintiff’s TCPA claim that NRS violated the TCPA and 47 C.F.R. § 64.1200  
25 by failing to include in its “prerecorded telephone messages” NRS’s business name and  
26  
27  
28

1 telephone number.

2 **IV. CONCLUSION**

3 The Court should grant NRS's Motion for Partial Judgment on the Pleadings.  
4 Plaintiff's TCPA claim relating to the "prerecorded telephone messages" fails to state a claim  
5 for relief.  
6

7 Dated: December 3, 2007

Sessions, Fishman & Nathan in California, L.L.P.

8 /s/ Debbie P. Kirkpatrick

9 Debbie P. Kirkpatrick

10 Attorney for Defendant,

Nationwide Recovery Systems, Ltd.

11 N:\Nationwide Recovery Systems Ltd (8949)\Kinder, James (8949-07-22323)\Motion on Pleadings\Memo. in Supp. of Judgment on Pleadings.doc



1 CASE NAME: KINDER v NATIONWIDE RECOVERY SYSTEMS, LTD.  
2 CASE NO: 37-2007-67042-CU-MC-CTL

3 **PROOF OF SERVICE**

4 I, the undersigned, hereby certify that I am a citizen of the United States, over the age  
5 of 18 years and not a party to the within action; my business address is 3667 Voltaire  
Street, San Diego, California 92106. On this date I served the within:

6 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF  
7 MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS**

8 ( XX ) BY U.S. MAIL

9 I served a true and correct copy of the above-named documents by mail by  
10 placing the same in a sealed envelope with postage fully prepaid, and depositing said  
11 envelope in the U.S. mail at San Diego, California. Said envelope(s) was/were  
addressed as listed hereafter:

12 ( ) BY FACSIMILIE MACHINE

13 I caused to be transmitted by facsimile machine a true copy of the above-named  
14 documents to the below listed. Attached hereto is the Confirmation Report confirming  
the status of the transmission.

15 ( ) BY PERSONAL SERVICE

16 I caused to be served by hand a true copy of the above named document as  
17 listed hereafter.

18 Chad Austin, Esq.  
19 3129 India St.  
20 San Diego, CA 92103

21 I declare under penalty of perjury under the laws of the State of California that the  
22 foregoing is true and correct.

23 Dated: December 5, 2007

24  
25  
26  
27  
28  
\_\_\_\_\_  
Marilyn Winder